BYD Auto Industry Co Ltd v Amdac (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-128–04 OF 2016
NOORIN BADARUDDIN JC
3 JANUARY 2017

Civil Procedure — Contempt of court — Committal proceedings — Applicant applied for order of committal against directors of respondent for breach of High Court order — Whether applicant satisfied standard of proof of beyond reasonable doubt that contemnors breached order — Whether respondent's justification afterthought — Whether imprisonment sentence should be ordered

This was an application ('encl 30') by the applicant for an order of committal against the contemnors, namely Hafizah bt Hamzah and Mohd Azizi bin Hamzah ('the contemnors') who were the directors of the respondent. Enclosure 30 arose from the contemnors willful disobedience/breach of the High Court order dated 9 June 2016 ('the order'). The applicant's case against the contemnors was that the respondent had blatantly breached the order by failing and/or neglecting to carry out the following: (a) to deposit the sum of RM4.5m into the joint account within 30 days of the order; (b) to file and serve an affidavit disclosing its full list of assets within seven days of service of the sealed copy of the order which included its bank account balances; and (c) to pay the applicant costs for the sum of RM20,000. In opposing encl 30, the contemnors contended that the respondent had complied with two of the four terms of the order ie ceasing all forms of communication with Sykt Prasarana and disclosing its list of assets. Further, the contemnors argued that the respondent had not complied with the remaining two terms of the order as it was in dire financial state and was therefore unable to draw on the necessary funds to comply with the order.

Held:

(1) The applicant had satisfied the standard of proof of beyond reasonable doubt and that the respondent had breached the order by refusing or neglecting to act within the prescribed period. As for the first breach ie the non-payment of RM4.5m, during the course of the substantive OS proceeding, the respondent had made revelation to the court that it had more than adequate assets to meet the applicant's claim and that there could be no possible risk of dissipation of assets. Given that the respondent had failed to put forward any evidence to suggest that there had been any material change of circumstances after the substantive

hearing, the respondent could not come to the court at the hearing of this contempt proceeding to state that it had no means to make the payment (see paras 35 & 49). A

(2) There was the second breach by the respondent ie no full disclosure of assets was made pursuant to the order. The disclosure affidavit was not filed and served within seven days of receipt of the sealed order and this was undisputed by the respondent. The respondent's belated act of disclosing details of its bank accounts and bank statements was proof that the respondent had willfully neglected/refused to disclose the same via the said disclosure affidavit. The respondent had also obviously committed the third breach ie the non-payment of costs wherein the order expressly stated that costs of RM20,000 were to be paid by the respondent to the applicant forthwith (see paras 50 & 53–54). B C

(3) The respondent's justification in failing to comply with the terms of the order was an afterthought as it had at all times during the substantive proceeding maintained that it had substantial assets to meet claim made by the applicant. The respondent had only raised its purported impecuniosity for the first time in this committal proceeding. As such, the respondent was estopped from raising in the present case the argument that it was financially not able to comply with the monetary obligations as stipulated in the said order. Further, this was a case in which an order for committal was warranted. The respondent had demonstrated a lackadaisical attitude and blatant neglect in its conduct. The contemnors' willful breach of the order was a conduct that tended to bring the court and the administration of the law into disrespect or disregard and an affront to the authority of the court (see para 55). D E F

(4) The court found that both contemnors were remorseful albeit the late apology. In addition, based on the testimonies and the demeanour of both contemnors, the court found that it was one Dato' Rafie Mohd Sain who was in fact in control of the whole situation. It would not do justice to impose an imprisonment sentence against both contemnors because they were indeed being 'controlled' by the alter ego of the respondent mentioned in the above. The court held that a heavy fine would have serve as a sufficient deterrent in this instance and appropriate in the circumstances of the case. The court therefore imposed on the contemnors a fine of RM50,000 each in default, a month imprisonment. The court further ordered both contemnors to pay fine of RM1,000 per day and one day imprisonment for such in default until the contempt was purged (see paras 57–59). G H I

[Bahasa Malaysia summary

Ini adalah permohonan ('lampiran 30') oleh perayu untuk perintah komital terhadap penghina-penghina, iaitu Hafizah bt Hamzah dan Mohd Azizi bin

A Hamzah ('penghina-penghina tersebut') yang mana adalah pengarah-pengarah responden. Lampiran 30 berbangkit daripada keingkaran sengaja/pelanggaran perintah Mahkamah Tinggi bertarikh 9 Jun 2016 ('perintah tersebut'). Kes pemohon terhadap penghina adalah bahawa responden telah dengan jelas melanggar perintah kerana gagal dan/atau mengabaikan untuk menjalankan
B berikut: (a) untuk mendeposit sejumlah RM4.5 juta ke dalam akaun bersama dalam masa 30 hari daripada perintah tersebut; (b) untuk memfailkan dan menyerahkan afidavit dengan mengemukakan senarai penuh asetnya dalam masa tujuh hari daripada penyerahan salinan perintah yang dimeterai yang mana termasuk baki akaun banknya; dan (c) untuk membayar pemohon kos
C sejumlah RM20,000. Dalam membantah lampiran 30, penghina-penghina berhujah bahawa responden telah mematuhi dua daripada empat terma perintah tersebut iaitu menamatkan kesemua bentuk komunikasi dengan Sykt Prasarana dan mendedahkan senarai asetnya. Selanjutnya, penghina-penghina berhujah bahawa responden telah mematuhi dengan dua terma perintah yang
D tinggal kerana ia berada dalam keadaan kewangan teruk dan oleh itu tidak dapat untuk mengambil dana yang diperlukan untuk mematuhi perintah tersebut.

Diputuskan:

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(1) Pemohon telah mematuhi standard pembuktian melampaui keraguan munasabah dan bahawa responden telah melanggar peritah dengan enggan atau mengabaikan untuk bertindak dalam tempoh yang ditetapkan. Berkaitan pelanggaran pertama iaitu tidak membayar
F RM4.5 juta, semasa perjalanan substantif prosiding saman pemula, responden telah membuat pendedahan kepada mahkamah bahawa ia mempunyai lebih daripada aset yang mencukupi untuk memenuhi tuntutan pemohon dan bahawa kemungkinan tidak terdapat risiko pelupusan aset. Oleh kerana responden telah gagal untuk
G mengemukakan apa-apa keterangan untuk mencadangkan bahawa terdapat apa-apa pertukaran keadaan material selepas pendengaran substantif, responden tidak boleh datang ke mahkamah pada masa pendengaran prosiding penghinaan untuk menyatakan bahawa ia tidak mempunyai cara untuk membuat pembayaran (lihat perenggan 35 &
H 49).

(2) Terdapat pelanggaran kedua oleh responden iaitu tiada pendedahan penuh asset dibuat berikutan perintah tersebut. Afidavit pendedahan tidak difailkan dan diserahkan dalam masa tujuh hari dari penerimaan perintah yang dimeterai dan ini tidak dipertikaikan oleh responden.
I Tindakan terlewat responden dengan mendedahkan butiran akaun banknya dan pernyataan bank adalah bukti bahawa responden telah dengan sengaja mengabaikan/enggan untuk mendedahkannya melalui afidavit pendedahan tersebut. Responden juga jelas melakukan pelanggaran ketiga iaitu tidak bayar kos di mana perintah secara jelas

nenyatakan bahawa kos RM20,000 adalah hendak dibayar oleh responden kepada pemohon serta-merta (lihat perenggan 50 & 53–54).

(3) Justifikasi responden dalam kegagalan untuk mematuhi dengan terma perintah adalah sesuatu yang difikirkan kemudian kerana ia telah pada kesemua masa semasa prosiding substantif mengekalkan bahawa ia mempunyai aset yang substansial untuk memenuhi tuntutan yang dibuat oleh permohon. Responden hanya membangkitkan keadaan tidak mempunyai wang yang dipersoalkannya bagi kali pertama di dalam prosiding komital ini. Dengan itu, responden diestop daripada membangkitkan dalam kes ini penghujahan bahawa secara kewangan ia tidak dapat memenuhi dengan tanggungjawab wang seperti yang ditetapkan di dalam perintah tersebut. Selanjutnya, ini adalah kes dalam mana perintah untuk komital adalah wajar. Responden telah menunjukkan sikap kurang sopan dan pengabaian jelas dalam tindakannya. Pelanggaran sengaja penghina-penghina terhadap perintah adalah tindakan yang akan membawa mahkamah dan pentadbiran undang-undang tidak dihormati atau diabaikan dan penghinaan kepada kuasa mahkamah (lihat perenggan 55).

(4) Mahkamah mendapati bahawa kedua-dua penghina adalah menyesal walaupun permintaan maaf terlambat. Selanjutnya berdasarkan keterangan-keterangan dan tingkah laku kedua-dua penghina, mahkamah mendapati bahawa adalah seorang bernama Dato' Rafie Mohd Sain yang sebenarnya mengawal keseluruhan keadaan. Ia tidak akan memberi keadilan untuk mengenakan hukuman penjara terhadap kedua-dua penghina kerana mereka sebenarnya adalah 'controlled' oleh alter ego responden yang disebut di atas. Mahkamah memutuskan bahawa denda berat akan menjadi sebagai pencegahan yang mencukupi dalam kes ini dan wajar dalam keadaan kes. Mahkamah oleh itu mengenakan ke atas penghina-penghina denda sebanyak RM50,000 setiap seorang jika ingkar, penjara sebulan. Mahkamah selanjutnya memerintah kedua-dua penghina membayar denda sebanyak RM1,000 sehari dan penjara satu hari untuk keingkaran sedemikian sehingga penghinaan dibersihkan (lihat perenggan 57–59).]

Notes

For cases on committal proceedings, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2482–2524.

Cases referred to

Eric Lau Man Hing v Eramara Jaya Sdn Bhd & Ors [2007] 2 MLJ 578, HC (refd)

Hong Kwi Seong v Ganad Media Sdn Bhd [2013] 2 MLJ 251, CA (refd)

Hong Leong Bank Bhd v Phung Tze Thiam John Phung [2008] 2 MLJ 785, CA (refd)

MBF Holdings Bhd & Anor v Houng Hai Kong & Ors [1995] 1 MLJ 135, HC (refd)
Malaysia Venture Capital Management Bhd v Teang Soo Thong & Anor [2016] 9 MLJ 766, HC (refd)
Mok Kah Hong v Zheng Zhuan Yao [2016] 3 SLR 1, CA (refd)
Tahir v Tay Kar Oon [2016] 3 SLR 296, HC (refd)
Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)
William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1994] 3 MLJ 40, HC (refd)

Legislation referred to

Rules of Court 2012 O 45 rr 1, 5, O 52

Lavinia Kumarendran (Maventhra Jothi with her) (Thomas Philip) for the applicant.
Shahabudin bin Shaik Alaudin (Rosnida bt Che Ibrahim with him) (Shahabudin & Rozima) for the respondent.

Noorin Badaruddin JC:

[1] The applicant, BYD Auto Industry Co Ltd, applied for an order of committal against the contemners, namely Hafizah bt Hamzah ('the first contemnor') and Mohd Azizi bin Hamzah ('the second contemnor') who are directors of the respondent (encl 30 dated 27 July 2016).

[2] This application arose from the contemners willful disobedience/breach of the High Court order of 9 June 2016.

[3] This court granted the order of committal and imposed a fine of RM50,000 on each contemners to be paid forthwith and one month imprisonment on both contemners for such in default. This court further ordered both contemners to pay a fine of RM1,000 per day and one day imprisonment for such in default until the contempt is purged. The contemners paid the fine of RM50,000 each. The stay application against the fine of RM1,000 was refused by this court on 1 December 2016. However, this court granted a stay on the daily imprisonment for such in default.

[4] The reasons for granting the application in encl 30 now follow.

BACKGROUND FACTS LEADING TO THE CONTEMPT PROCEEDING

[5] By way of an originating summons ('the OS') and ex parte notice of application dated 4 April 2016 and 5 April 2016 respectively, the applicant sought certain reliefs against the respondent pending the commencement of arbitration proceedings.

[6] In this regard, the main relief sought by the applicant in the OS was for payment of a sum of RM4.5m ('the said sum') to be deposited into a joint stakeholders account ('the joint account') pending the commencement of arbitration proceedings between the parties until full and final disposal of the same. The applicant's cause of action against the respondent is for breach of contract. The applicant contended that the respondent had wrongly set off the said sum which was rightfully due and owing to the applicant at the material time.

[7] The purpose for seeking the orders sought was that the applicant had reason to believe that there was a real risk that the respondent would dissipate and/or remove its assets within the jurisdiction pending the conclusion of the arbitration. This was premised upon the dishonest conduct of the respondent and the alter ego of the respondent, one Dato' Rafie Mohd Sain and that the said sum now forms the subject matter of the arbitration.

[8] On 20 April 2016, pending the inter partes hearing of the OS, the applicant proceeded to commence arbitration proceedings by sending notice of arbitration dated 20 April 2016 to the respondent pursuant to article 4 of the Kuala Lumpur UNCITRAL Rules 2013. On 21 April 2016, the applicant had formally written to the director of the Kuala Lumpur Regional Centre for Arbitration ('KLRCA') enclosing a copy of the said notice of arbitration and a non-refundable deposit of RM1,000.

[9] On 19 May 2016, the KLRCA informed the applicant that the arbitration had been successfully registered and had been deemed for all intents and purposes to have commenced. The respondent however failed to reply to the notice of arbitration within the 30 days it was entitled to nor did it reply to the same at all until the hearing of this application. The respondent further failed to respond to any of the letters by the applicant which sought for confirmation and proposals from the respondent through its solicitors as to the appointment of arbitrators.

[10] Notwithstanding the respondent's failure to respond to any of the applicant's abovementioned letters, by way of a letter dated 29 June 2016, the KLRCA has informed the applicant that an independent arbitrator has been

duly appointed to conduct the proceedings therein.

[11] On 9 June 2016, after hearing submissions of both parties on 30 May 2016, this court allowed the prayers sought in the OS filed by the applicant. The reliefs sought and allowed by this court ('the order') are as follows:

(a) a sum of RM4.5m is to be paid into a joint account held in the name of the solicitors for the applicant and the respondent as Stakeholder within a period of 30 days from the date of the order, pending the full and final disposal of arbitration proceedings between the applicant and the respondent;

(b) an order that the respondent whether acting by its servants or agents or otherwise by any way whatsoever, in seven days from the service of the order, disclose to the applicant by way of sworn affidavit the full value of all assets owned by it, that shows the full particulars of the type and details of all assets and location of the said whether held in the personal name of its directors or nominees and whether owned solely or jointly; and

(c) costs for the sum of RM20,000 are to be paid by the respondent.

[12] The respondent breached the terms of the order by failing, inter alia, to carry out the act within the requisite time period as provided therein after the seal court order was served on their solicitors on 16 June 2016 at its registered address on 30 June 2016.

[13] In compliance with the said order, the applicant, through its solicitors had on 9 June 2016 duly attempted to set up the said joint account by approaching Malayan Banking Bhd ('Maybank'). Letters and the follow-ups were sent to the respondent's solicitors but the respondent repeatedly failed to respond and to provide the requisite details towards the setting up of the said joint account. Only on 30 June 2016, approximately 21 days after the granting of the order, the respondent responded via a letter providing copies of the respondent's solicitors identification card and practicing certificate. In this regard, the applicant's solicitors had only received a fax copy of the letter of 30 June 2016 whilst a hardcopy of the same along with its enclosures were only served on the applicant's solicitors on 4 July 2016.

[14] The respondent had as of 11 July 2016 ie more than 30 days after the grant of the order failed to deposit the said sum of RM4.5m into the said joint account.

[15] The respondent further failed to pay forthwith the costs of RM20,000 awarded to the applicant pursuant to the order.

[16] The respondent was stated to further breached the order by failing to file and serve a copy of an affidavit ('the said affidavit') disclosing the respondent's list of assets within seven days from the date of service of the sealed court order. However, only on 27 June 2016 after numerous demands and/or requests via the applicant's solicitors, the respondent filed and served an affidavit purportedly disclosing its lists of assets in compliance with the order which by then, the respondent was already delayed by four days.

[17] It is further stated that in the said affidavit, the respondent did not disclose any of its banking accounts including any fixed deposit accounts held in its name.

[18] The respondent did not state that it does not have any banking accounts which according to the applicant, must be taken to mean that the same does exist but the respondent has chosen not to disclose it. Further, the said affidavit does not disclose the assets of the respondent's directors and/or its nominees in spite of the order stating that the same be included therein.

SUMMARY OF THE APPLICANT'S CONTENTION

[19] The applicant's case against the contemners as directors of the respondent is that the respondent has blatantly breached the order by failing and/or neglecting to carry out the following:

(a) to deposit the said sum of RM 4.5m (or any part thereof) into the joint account within 30 days of the said order (ie on or by 9 July 2016);

(b) to file and serve an affidavit disclosing its full list of assets within seven days of service of the sealed copy of the order which includes its bank account balances; and

(c) to pay the applicant costs for the sum of RM20,000 (or any part thereof).

[20] The applicant submits that until 2 September 2016, the respondent is in breach of the said order for a period of 84 days (approximately three months in default).

THE RESPONDENT/CONTEMNORS' CASE

[21] In opposing encl 30, the contemners have taken the following stance on behalf of the respondent:

(a) that the respondent has complied with two of the four terms of the order being the following:

(i) ceasing all forms of communication with Sykt Prasarana; and

(ii) disclosing its list of assets;

(b) that the respondent has not complied with the remaining two terms of the order as it is in a dire financial state and is therefore unable to draw on the necessary funds to comply with the order.

[22] The financial impecuniosity allegedly faced by the respondent is purportedly explained and/or justified by virtue of the following averments stated in paras 15–19 of the respondent's affidavit in reply:

(a) the defendant has utilised its monies held in its banking accounts towards its ordinary daily business expenses;

(b) the defendant has been seeking new investors and/or investment opportunities to raise capital/funds; and

(c) the defendant at present is on the brink of being wound up.

THE GENERAL LEGAL PRINCIPLES

[23] The then Supreme Court in *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 through the judgment of Abdul Hamid Omar LP (as he then was) states the following:

> Obedience to court order
>
> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

[24] It is also an established principle of law that a person or body corporate against which an order of court has been issued is duty bound to obey that order until it is set aside.

[25] The Rules of Court 2012 ('the ROC') further provides O 45 r 1 which states that any judgment or order for the payment of money may be enforced by way of an order of committal in a case in which it applies. The relevant portions of O 45 r 5 of the Rules of Court 2012 states:

(1) Where —

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or

(b) a person disobeys a judgment or order requiring him to abstain from

doing an act,

then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:

(A) with the leave of the Court, an order of committal;

(B) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;

...

[26] The contemnors have a duty to comply strictly with the terms of any order of court, particularly so when an injunction has been granted against a corporation. Breach of an injunction order can attract committal proceedings. In *MBF Holdings Bhd & Anor v Houng Hai Kong & Ors* [1995] 1 MLJ 135, Anuar J (as he then was), had this to say at p 144 of the report:

> An injunction is a most solemn and authoritative form of order made by the court expressly enjoining a party either to do a particular act or refrain from doing a particular act. It is the duty of those so enjoined strictly to observe the terms of the injunction. The simple and only view is that an order must be obeyed, that those who wish to get rid of that order must do so by the proper course. So long as it exists, the order must be obeyed, and obeyed to the letter.

[27] In *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1994] 3 MLJ 40 Abu Mansor J (as he then was) at p 46 states:

> I find merit in the applicant's counsel's argument that directors of a company who have been notified of an injunction are liable for the breach of the injunction by the company and it is no defence if they claim they were only 'sleeping directors'.

[28] The Court of Appeal in *Hong Kwi Seong v Ganad Media Sdn Bhd* [2013] 2 MLJ 251 further illustrates the principle that an order for the payment of money may be enforced by an order for committal. The court states at p 258 of the report as follows:

> While it is true that a money judgment could be enforced pursuant to the Debtors' Act 1957, the Act does not, either expressly or by necessary implication, exclude committal proceedings in the event of a defendant's refusal or neglect to do the act within the time specified in the money judgment.

[29] In *Hong Kwi Seong v Ganad Media Sdn Bhd*, the issue that arose for the Court of Appeal's determination was whether the learned High Court judge was correct in dismissing the appellant's application to set aside the committal orders and the warrants of committal. It was contended before the Court of Appeal that non-payment of a money judgment cannot be punished with contempt of court and the appellant relied on the case of *Hong Leong Bank Bhd v Phung Tze Thiam John Phung* [2008] 2 MLJ 785. The Court of Appeal held:

(1) The first point in Hong Leong Bank which was the choice of forum was inapplicable to the instant appeal as committal proceedings were actually commenced in the High Court as the court of first instance. The facts in this appeal were distinguishable from Hong Leong Bank. Furthermore, the two English authorities referred to in Hong Leong Bank concern the construction of the crucial terms of the order. These terms ordered the plaintiff to recover the money, as in In Re Oddy or the plaintiff to have a return of the shares, as in Iberian Trust Ltd. These orders did not require the defendant to do or refrain from doing an act, and hence, obviously, those orders could not be enforced against the defendant by way of committal for contempt.

(2) The court was unable to agree with the decision of the Court of Appeal in Hong Leong Bank, that a money judgment to repay the money could not be enforced by committal proceedings. While it is true that a money judgment could be enforced pursuant to the Debtors' Act 1957, the Act does not, either expressly or by necessary implication, exclude committal proceedings in the event of a defendant's refusal or neglect to do the act within the time specified in the money judgment. The decision of the Court of Appeal in Hong Leong Bank did not assist the appellant in the instant appeal (see para 14).

(3) The terms of the order clearly directed the appellant to pay the judgment sum infive instalments on or before the respective dates. In other words, the appellant was directed to do an act within a specified date. Despite that, the appellant had refused or neglected to do. The terms of the order in the instant appeal were peremptory in the sense that the appellant was commanded to make payment.

[30] Further in the same case at p 259, the Court of Appeal finally states:

In the instant appeal, the terms of the order clearly directed the appellant to pay the judgment sum in five instalments on or before the respective dates. In other words, the appellant was directed to do an act within a specified date. Despite that, the appellant had refused or neglected to do. The terms of the order in the instant appeal are peremptory in the sense that the appellant was commanded to make payment. These terms come within the scope of O 45 r 5(1)(a)(i). We are therefore unable to sustain the submission presented for the defendant. We answer the above question in the affirmative.

[31] This court finds that the present case falls squarely within ratio of the Court of Appeal decision in *Hong Kwi Seong v Ganad Media Sdn Bhd*, where the terms of the order clearly directed the respondent to pay the sum of RM4.5m within 30 days of the order. The only distinction to be drawn from the facts of this case herein and that of *Hong Kwi Seong v Ganad Media Sdn Bhd* is, in that case, the said sum in question was a judgment sum. However, the similarity is, the said sum was ordered to be paid within a stipulated time frame and hence could be enforced by way of committal for contempt. It is undisputed, that the respondent failed to adhere to the commandment to make the payment of the said sum stated in the order.

[32] Further in the recent decision of *Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1, the Singapore Court of Appeal expressly cited with approval the approach of the Malaysian Court of Appeal in *Hong Kwi Seong v Ganad Media Sdn Bhd* case and made a distinction between an order to pay a sum of money with recovery of money. The court further held that breaches of an order involving the payment of money are capable of being enforced by way of committal proceedings.

> In the case of an order for the payment of money, the defendant is ordered to pay the plaintiff a sum of money. In other words, the onus is on the defendant, as the named obligor, to effect compliance with the order. This stands in contrast to an order for the recovery of money, where the onus is on the plaintiff to recover the money from the defendant. An order for the recovery of money does not explicitly require the defendant to do a specific act. In the circumstances, the defendant cannot be held liable under the law of contempt in the event that the plaintiff fails to recover the money from the defendant.

[33] The respondent claimed that it has not complied with the remaining two terms of the order as it is in a dire financial state and is therefore unable to draw on the necessary funds to comply with the order. This stance taken by the respondent runs contrary to the positive stance taken by it in the substantive OS proceeding. During the hearing of the OS, the respondent in their affidavit and submission objected to the mareva injunction application stating that at the material time ie April 2016, it was operating its principal business relating to the provision of spare parts and maintenance services to the Government of Malaysia and its principal business at that material time remained active and on-going with further service orders anticipated in the future.

[34] The respondent averred that it had a pre-existing maintenance contract with the Ministry of Defence and Fire Department valued at RM4,628,221.33 and it had secured a contract with the Ministry of Defence for a sum of RM6,360,000 as of 5 February 2016. The respondent also stated that it had the Panorama Malacca Project awarded by a Malacca State Government owned company which was purportedly valued at RM139,000,000.

[35] During the course of the OS proceeding the respondent made a revelation to this court that it had more than adequate assets to meet the applicant's claim and that there could be no possible risk of dissipation of assets.

[36] That was three months before the hearing of this application. Then, in less than two months the respondent now tells the court that it is in a bad financial state; a new situation brought about only when this contempt proceeding has begun.

[37] This court finds that the respondent's financial impecuniosity is no

defence to a breach of the order. The applicant had highlighted to this court how the purported position that the respondent is in financial dire states cannot be true and this court has considered the facts so highlighted and agreed with the applicant's contention. These are the facts:

(a) a large sum of monies had been removed and/or transferred by the defendant between the months of March to July 2016 without any apparent purpose or basis; and

(b) it is patently clear from the defendant's bank accounts that large sums of monies were transferred from the defendant's primary account to the defendant's other company accounts (ie the Bank Islam account) and to its de facto director's personal account, namely Dato' Rafie (whose wife is the first contemnor herein);
(exh B5 of the defendant's affidavit in reply; and paras 21–22 of the applicant's affidavit in reply).

[38] Referring to the exh B5 of the respondent's affidavit in reply, there were 15 withdrawals from the respondent's Al-Rahji bank account (Account No 12900–1881551143) and transferred into the Bank Islam account with immediate effect to an undisclosed location and for an unknown purpose. The withdrawals are extracted as follows:

Withdrawals from the defendant's Al-Rajhi Bank Account (Acc No: 12900–1881551143)

No.	Date	Purpose	Amount (RM)
1.	9.3.2016	Transfer to own account	108,000.00
2.	18.3.2016	Transfer to own account	306,000.00
3.	21.3.2016	Transfer to own company account	402,000.00
4.	21.3.2016	Debit transfer to Mohamed Rafie bin Sain	15,000.00
5.	30.3.2016	Debit transfer to Mohamed Rafie bin Sain	30,000.00
6.	22.4.2016	Transfer to other bank account	40,000.00
7.	30.5.2016	Debit transfer to MyEbus (M) Sdn Bhd	71,000.00
8.	29.6.2016	Outgoing IBG transfer to Lourdes Ventures	50,000.00
9.	30.6.2016	Outgoing IBG transfer to Lourdes Ventures	30,000.00
10.	30.6.2016	Outgoing IBG transfer to Lourdes Ventures	60,000.00
11.	1.7.2016	Fund transfer to Amdac (M) Sdn Bhd	57,574.89

No.	Date	Purpose	Amount (RM)
12.	5.7.2016	Fund transfer to Amdac (M) Sdn Bhd	31,133.50
13.	5.7.2016	Fund transfer to Amdac (M) Sdn Bhd	29,929.00
14.	11.7.2016	Outgoing IBG transfer to own company account	8,600.00
15.	11.7.2016	Outgoing IBG transfer to own company account	13,200.00
TOTAL: 1,252,437.39			

[39] Further, there are numerous withdrawals pertaining to 'cheque clearances' that have not been explained and/or justified by the respondent to date. The transactions are extracted as follows:

Cheque Clearance Transactions from the Defendant's Al-Rajhi Bank Account (Acc No: 12900-1881551143)

No.	Date	Purpose	Amount (RM)
1.	05.2.2016	Cheque Debit	3,270.00
2.	05.2.2016	Cheque Debit	4,250.00
3.	05.2.2016	Cheque Debit	2,220.00
4.	16.2.2016	Cheque Debit	10,812.60
5.	25.2.2016	Cheque Debit	2,695.50
6.	26.2.2016	Cheque Debit	2, 736.00
7.	08.3.2016	Cheque Debit	6,000.00
8.	08.3.2016	Cheque Debit	2,000.00
9.	08.3.2016	Cheque Debit	4,250.00
10.	08.3.2016	Cheque Debit	19,525.62
11.	08.3.2016	Cheque Debit	3,271.94
12.	09.3.2016	Cheque Debit	5,928.00
13.	09.3.2016	Cheque Debit	6,000.00
14.	09.3.2016	Cheque Debit	2,000.00
15.	09.3.2016	Cheque Debit	38,913.55
16.	09.3.2016	Cheque Debit	7,800.00
17.	09.3.2016	Cheque Debit	2,050.00
18.	16.3.2016	Cheque Debit	3,616.90
19.	18.3.2016	Cheque Debit	8,298.80
20.	23.3.2016	Cheque Debit	6,865.30
21.	29.3.2016	Cheque Debit	20,000.00
22.	31.3.2016	Cheque Debit	2,000.00
23.	31.3.2016	Cheque Debit	6,000.00
24.	31.3.2016	Cheque Debit	7,800.00
25.	31.3.2016	Cheque Debit	8,000.00

26.	04.4.2016	Cheque Debit	4,000.00
27.	08.4.2016	Cheque Debit	23,931.55
28.	08.4.2016	Cheque Debit	2,500.00
29.	11.4.2016	Cheque Debit	4,200.00
30.	14.4.2016	Cheque Debit	13,271.15
31.	15.4.2016	Cheque Debit	18,000.00
32.	20.4.2016	Cheque Debit	10,473.80
33.	21.4.2016	Cheque Debit	5,841.45
34.	28.4.2016	Cheque Debit	11,417.30
35.	29.4.2016	Cheque Debit	7,910.00
36.	06.5.2016	Cheque Debit	6,000.00
37.	09.5.2016	Cheque Debit	6,714.25
38.	17.5.2016	Cheque Debit	14,511.25
39.	19.5.2016	Cheque Debit	2,638. 70
40.	20.5.2016	Cheque Debit	4, 786.05
41.	23.5.2016	Cheque Debit	5,349.00
42.	26.5.2016	Cheque Debit	16,821.67
43.	26.5.2016	Cheque Debit	7,800.00
44.	27.5.2016	Cheque Debit	2,000.00
45.	27.5.2016	Cheque Debit	17,921.66
46.	30.5.2016	Cheque Debit	8,850.00
47.	06.6.2016	Cheque Debit	2,000.00
48.	07.6.2016	Cheque Debit	8,657.15
49.	08.6.2016	Cheque Debit	29,445.20
50.	08.6.2016	Cheque Debit	7,800.00
51.	15.6.2016	Cheque Debit	46,484.55
52.	16.6.2016	Cheque Debit	4,581.85
53.	01.7.2016	Cheque Debit	83,067.10
54.	01.7.2016	Cheque Debit	8,260.00
55.	04.7.2016	Cheque Debit	8,600.00
56.	05.7.2016	Cheque Debit	3,000.00
57.	26.7.2016	Cheque Debit	50,000.00
58.	29.7.2016	Cheque Debit	6,870.00
TOTAL: 640,007.89			

[40] It remains unclear if the respondent only operates five bank accounts as there is no positive averment to that effect.

[41] Further, the respondent has not stated that any of the above named projects or awards have been terminated and or has ceased. In that regard it must be taken that they all remain as income to the respondent.

[42] The second contemnor, namely Mohd Azizi bin Hamzah has not affirmed an affidavit as to his position with regards to the leave for committal against him, neither has he stated on oath that he does or does not have any of the respondent's assets held in his personal name.

[43] This court finds further that the respondent has failed to render any explanation as to the purpose and or use of the sum of RM11.8m it had received from Malaysian Debt Ventures Bhd that it received sometime in September 2015. The said sum is not even reflected in any of the respondent's bank statements as exhibited in exhs '8–5' and '8–6' of the respondent's affidavit in reply.

[44] In *Tahir v Tay Kar Oon* [2016] 3 SLR 296, the Singapore High Court made a finding that the defendant had during the tenancy of the Mareva injunction, steadfastly removed large sums of monies from her personal bank account. The court states:

> At the third hearing on 26 February 2016, the defendant finally disclosed her missing statements from OCBC Account No [xxx] for the months of May 2015–November 2015, and this disclosed breaches of the Mareva Injunction that were not included in the O 52 r 2(2) statement. This confirmed the plaintiff's suspicions that the defendant was trying to suppress documents that show breaches of the Mareva Injunction. The injunction was issued on 27 October 2015, yet on 28 October 2015, with full notice of the Mareva Injunction, the defendant in three withdrawals took $3,000 from the account. This effectively emptied the entire account, leaving a balance of $153 at the end of the month.
>
> [28] At this juncture of the proceedings, I formed the view that the reason why she had been flouting the court orders for disclosure and dragging her feet in relation to purging the contempt was at least motivated in part by her desire to hide breaches of the Mareva Injunction hitherto unknown to the plaintiff. By the time the withdrawals happened, the defendant was clearly on the verge of bankruptcy as she was made bankrupt around two weeks after those withdrawals.

[45] The defence of financial impecuniosity of a party if it is proven to the satisfaction of the court must be an issue to be proved by the party so relying on it. Support for the principle is derived from *Mok Kah Hong v Zheng Zhuan Yao* and it is accentuated in cases where the respondent has failed to adduce cogent evidence to suggest any material change in circumstances after the conclusion of the substantive proceeding. Steven Chong J delivering the judgment of the Singapore Court of Appeal states:

> For instance, the husband in the present case has, throughout the entire course of the committal proceedings, consistently adopted the position that he had no means to comply with the order of court. However, the husband has failed to adduce any evidence to suggest any material change in circumstances after the conclusion of the substantive appeal. In this regard, the husband's contention was no more than an

attempt to challenge the findings that we had already made in the substantive appeal, ie, that the husband was, in fact, a man of substantial means. It will be recalled that we had assessed the value of the husband's known assets at S$14,385,364.63.

[46] The respondent did not make any attempt to come back to this court to seek a variation order for that matter, if it is true that it is unable to or had no means of paying after the order was made.

[47] In *Eric Lau Man Hing v Eramara Jaya Sdn Bhd & Ors* [2007] 2 MLJ 578 Selventhiran J (as he then was) at p 586 made the following finding:

> [17] It was also the finding of this court during the hearing of the oppression petition (see *Eric Lau Man Hing v Eramara Jaya Sdn Bhd & Ors*) that large amounts of monies were easily transferred by the respondents between themselves, their family members and other related companies. They could not therefore subsequently argue that the monies belonged to other companies. Even if (the respondents were unable to or had no means to pay for the shares in the company, which they were ordered to, the proper course [or them to have adopted should have been to have instructed their solicitors or counsel to come back to this court to seek a variation of the order. That was never done. (Emphasis added.)

[48] This court finds that the respondent's conduct dictates that it is not impecunious or at the very least there could not be a material change in its financial standing between the substantive hearing and this present application/proceeding.

[49] This court finds that the applicant has satisfied the standard of proof of beyond reasonable doubt and that the respondent has breached the order by refusing or neglecting to act within the prescribed period. As to the first breach, ie the non-payment of RM4.5m, this court has looked at the respondent's financial means which have been canvassed during the course of the substantive hearing in the mareva injunction application. Given that the respondent has failed to put forward any evidence to suggest that there has been any material change of circumstances after the substantive hearing, in light of the above findings and evaluation, the respondent cannot come to this court at the hearing of this contempt proceeding to state that it has no means to make the payment.

[50] This court further finds that there is the second breach ie no full disclosure of assets is made pursuant to the order. It is trite that in compliance with an order for a mareva injunction, the affidavit disclosing the respondent's full list assets or more commonly referred to as the 'disclosure affidavit', must necessarily set out details of the respondent's bank account(s) and accompanying particulars or documents thereto. It cannot be denied that

monies held in a respondent bank account(s) must necessarily form part of its' list of assets.

[51] This court in *Malaysia Venture Capital Management Bhd v Teang Soo Thong & Anor* [2016] 9 MLJ 766 a case which dealt with amongst others the failure of the defendants to disclose any bank account and had not made a full and proper disclosure of the defendant's respective assets, made a finding that the failure of the defendants to disclose their bank accounts amounted to a clear breach of the court order.

[52] The above principle of law is fortified by the recent Singapore High Court decision of *Tahir v Tay Kar Oon* wherein the court held that the defendant's omission to disclose her personal bank account pursuant to the disclosure affidavit was a breach sufficiently serious to warrant an order for committal to be made against the defendant. As set out by the applicant at paras 22–24 of the O 52 statement in that:

(a) the respondent's disclosure affidavit of 27 June 2016 does not disclose any of the its' banking accounts and accompanying particulars and documents thereto;

(b) no disclosure of any amount held in any of the banking accounts; and

(c) the said disclosure affidavit does not disclose any of the respondent assets which are held in the personal capacity of its' directors.

[53] In any event, the said disclosure affidavit was not filed and served within seven days of receipt of the sealed order and this is undisputed by the respondent. The respondent in opposing the committal proceedings herein, takes a semantical argument that the said order merely required it to 'set out' and not 'disclose' its list of assets. This court finds that the respondent's belated act of disclosing details of its bank accounts and bank statements is proof that the it willfully neglected/refused to disclose the same via the said disclosure affidavit.

[54] The respondent has also obviously committed the third breach ie the non-payment of costs wherein the order expressly states that costs of RM20,000 were to be paid by the respondent to the applicant forthwith. It is undisputed that to date, in spite of numerous demands and/or request to do so, the respondent has failed to pay the applicant the sum of RM20,000 or any part thereof. Again, this court finds that the respondent's act of neglecting/refusing to pay the sum of RM20,000 amounts to a willful breach of the order.

[55] It is of the considered view that the respondent's justification in failing

to comply with the terms of the order is an afterthought as it has at all times during the substantive proceeding/OS maintained that it had substantial assets to meet claim made by the applicant. The respondent had failed to respond to numerous letters issued by the applicant pertaining to compliance of the order and this court finds that the respondent had only raised its purported impecuniosity for the first time via its' affidavits in reply filed on 22 August 2016 in this committal proceeding. As such, the respondent is now estopped from raising the argument that it is financially not able to comply with the monetary obligations as stipulated in the said order. Whilst it is accepted that not every default in the payment of a monetary sum pursuant to a judgment or order should give rise to committal proceedings, this is a case in which an order for committal is warranted. Throughout the arbitration process/proceeding, the OS/Mareva injunction proceeding and from the order granted by the court, the respondent has demonstrated a lackadaisical attitude and blatant neglect in its conduct. The contemnors' willful breach of the order is a conduct that tends to bring the court and the administration of the law into disrespect or disregard and an affront to the authority of the court.

SENTENCE

[56] The applicant in their submission forwarded plethora of authorities to support its' argument for a custodial sentence. Nevertheless, the law confers upon our courts an unfettered discretion in the exercise of the jurisdiction relating to sentencing. This discretion is however a judicial discretion which must be exercised in accordance with established judicial principles, having regard to the particular matrix of facts and circumstances in each particular case.

[57] This court took note of the fact that both contemnors did not offer any apology in their affidavits until they mitigated the matter before this court when they were called to explain. But this court finds that both contemnors are remorseful albeit the late apology. They have shown to this court that they are indeed not in control of the situation that arose. This court noted that the main character in this whole fiasco is none other than the alter ego of the respondent ie one Dato' Rafie Mohd Sain who has without failed attended the hearing of the substantive as well as this proceeding. The first contemnor is the wife to this Dato' Rafie Mohd Sain and from the testimonies and the demeanour of both contemners, this court could gather that it is Dato' Rafie Mohd Sain who are in actual fact in control of the whole situation. Both contemners reflected to this court that they are indeed in a 'hopeless' situation where the respondent is concerned in this matter as the main player is none other than Dato' Rafie Mohd Sain.

[58] This court finds that it will not do justice to impose an imprisonment

sentence against both contemnors in light of the fact that they are indeed being 'controlled' by the alter ego of the respondent mentioned in the above. Be that as it may, the contemnors are made directors of the respondent and they are responsible and must obey the order of the court by virtue of their positions. The respondent kept on telling this court that money is coming and the latest (at the hearing of the stay application) being some shareholders cum subscription agreement/investment is being seriously negotiated with the respondent. As such, having considered all the relevant surrounding circumstances, without losing sight of the gravity and seriousness of the contemnors' act of contempt, this court held the view that a heavy fine would serve as a sufficient deterrent in this instance and appropriate in the particular circumstances of this case.

[59] This court therefore imposed on the contemnors a fine of RM50,000 each in default, a month imprisonment. This court further ordered both contemnors to pay a fine of RM1,000 per day and one day imprisonment for such in default until the contempt is purged.

Order accordingly.

Reported by Dzulqarnain Ab Fatar